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OFFICE OF PETITIONS

In re Application of	:
Shelp et al.	:
Application No. 10/757,733	: DECISION DISMISSING
Filed: 15 January, 2004	: PETITION
Attorney Docket No. 616-76US	:

This is a decision on the petition filed on 15 January, 2004, requesting that the above-identified application be accorded a filing date of 16 September, 2003.

The petition is dismissed.

Petitioners assert that the application was originally filed on 16 September, 2003, but was lost after receipt by the U.S. Patent and Trademark Office. Specifically, petitioners assert that the application was sent to the USPTO by Federal Express on 15 September, 2003. In support, petitioners have provided a copy of the Federal Express Air Waybill, a Federal Express delivery confirmation printout as well as a declaration by counsel's office manager, Karen M. Owens, and printout of a log entry purporting to show where the application was entered prior to deposit in Express Mail.

A review of the official file reveals no application papers filed on 16 September, 2003, are located therein. However, the file contains 17 pages of written description, 4 pages containing 12 claims, 4 sheets of drawings, 1 page of abstract, a declaration, and an Application Data Sheet, all filed on 15 January, 2004. At the outset, it is noted that had petitioners utilized an itemized return postcard in accordance with Section 503 of the Manual of Patent Examining Procedure (MPEP), petitioners could have avoided the predicament that has now occurred. A postcard

receipt which itemizes and properly identifies the items which are being filed serves as prima facie evidence of receipt in the USPTO of all of the items listed thereon on the date stamped thereon by the USPTO. Where the records of the Office (e.g. the file of the application) contain any document(s) or fee(s) corresponding to the contents of the correspondence at issue, the Office will rely upon its official record of the contents of such correspondence in the absence of convincing evidence (e.g. a postcard receipt under MPEP 503 containing specific itemization of the document(s) or fee(s) purported to have been filed with the correspondence at issue) that the Office received and misplaced any document(s) or fee(s) that is not among the official records of the Office. If a new application is being filed, all parts of the application being submitted should be separately listed on the postcard (e.g. the number of pages of specification (including written description, claims and abstract) number of claims, number of sheets of drawings, number of pages of oath/declaration. The postcard receipt will not serve as *prima facie* evidence of receipt of any item which is not adequately itemized on the postcard.¹ In the absence of such a postcard, petitioners have provided no evidence that the application papers were filed on 16 September, 2003.

Furthermore, petitioners did not avail themselves of the Express Mail procedures prescribed by 37 CFR 1.10. Under 35 U.S.C. § 111, the filing date of an application is defined as the date the specification and drawings are filed in the U.S. Patent and Trademark Office. Under 35 U.S.C. § 21, the Commissioner may by rule prescribe that any paper or fee required to be filed in the U.S. Patent and Trademark Office will be considered filed in the Office on the date on which it was deposited with the United States Postal Service or would have been deposited with the United States Postal Service in Express Mail "Post Office to Addressee" Service but for postal service interruptions or emergencies designed by the Commissioner. However, petitioners concede that the application was not filed with the USPS, as such, petitioners assumed the risk that the application may not receive the desired filing date.

The Office also notes that Ms. Owens affidavit is not persuasive, as it was made almost four months after the events in question and recite personal remembrances of the preparation and filing of the application with the USPTO. The application does not appear to be unusual and it is not understood why the filing of this

¹MPEP 503.

particular application would stand out in such detail in the affiant's memory, particularly in view of the fact that affiant prepared and mailed similar papers to the USPTO on a routine, daily basis. More to the point, Ms. Owens states that she completed the mail log entry before the application papers were deposited with Federal Express. Assuming, *arguendo*, petitioners had used Express Mail service, the log book entry would not satisfy the requirements of 37 CFR 1.10(d) because the log book entry was not made after and within one day of deposit of the application papers with the USPS.

Lastly, with regard to the FedEx Delivery Confirmation facsimile showing that a delivery was signed for by "M.ASFAW", and delivered on 16 September, 2003, the Office cannot neither verify what papers were delivered with this shipment, nor confirm that this shipment contained the present application.

In summary, petitioners simply have not provided convincing evidence that the application papers were filed in the USPTO on 16 September, 2003, or any date prior to 15 January, 2004.

Accordingly, the petition is dismissed. As this petition was not necessitated by USPTO error, the petition fee will not be refunded.

Any request for reconsideration should be filed within **TWO MONTHS** of the date of this decision in order to be considered timely. This time period may not be extended pursuant to 37 CFR 1.136.

Further correspondence with respect to this matter should be addressed as follows:

By mail: Mail Stop Petition
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Telephone inquiries concerning this matter may be directed to the undersigned at (703)308-6918.

A handwritten signature in cursive script, appearing to read "D Wood".

Douglas I. Wood
Senior Petitions Attorney
Office of Petitions